Ahmad Azhan bin Gelang Sebar v Timbalan Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–167–07 OF 2021
ROZ MAWAR JC
3 MARCH 2022

Criminal Procedure — Habeas corpus — Application for — Detention order issued against applicant for involvement in drug trafficking activities — Applicant applied for writ of habeas corpus — Whether allegation of fact did not refer to 'a substantial body of persons' — Whether requirement for detention had not been fulfilled — Whether detention order unlawful and ultra vires — Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)

The Deputy Minister of Home Affairs had issued a detention order pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 against the applicant for the applicant's involvement in drug trafficking activities. Aggrieved by the decision, the applicant filed the present application for a writ of habeas corpus challenging the legality of the detention order. The applicant contended that the allegation of fact made no reference to 'a substantial body of persons' and only referred to him individually, as such, the requirement for detention had not been fulfilled, making the detention order unlawful. In support of the submission, the applicant relied on the Federal Court's decision in the case of *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 ('*Selva Vinayagam*'s case'). Further, the applicant submitted that any subsequent attempt to alter any detention order or reasons thereto, were not permitted by law and could not make good the procedural irregularity.

Held, setting aside the detention order, issuing writ of habeas corpus, and setting the applicant at liberty forthwith:

(1) The court was bound by the Federal Court's decision in *Selva Vinayagam*'s case. In the present case, the allegations of facts for the detention order did not state that the activity which had been taken or was being threatened by a substantial body of persons related to or involved the trafficking in dangerous drugs. There was also no statement that the applicant was a member of a substantial body of persons. Based on the allegations of fact, the court found that the applicant had acted alone and that having bought the supplies from a 'pengedar dadah tempatan' did not make him acting in concert or in association or relation with a substantial body of persons (see paras 19, 24 & 26).

(2) As there were omissions or absence of the fact that the activity which had been taken or was being threatened by a substantial body of persons related to or involved the trafficking in dangerous drugs and that the applicant was a member of the substantial body of persons, this indicated that the mind of the Deputy Minister was not applied to the question of preventive detention of the applicant. The detention order was therefore ultra vires (see para 36).

[Bahasa Malaysia summary

Timbalan Menteri Dalam Negeri telah mengeluarkan perintah tahanan menurut s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 terhadap pemohon kerana penglibatan pemohon dalam aktiviti pengedaran dadah. Terkilan dengan keputusan tersebut, pemohon memfailkan permohonan semasa untuk mendapatkan writ habeas corpus bagi mencabar kesahihan perintah tahanan tersebut. Pemohon berhujah bahawa pengataan fakta tidak merujuk kepada *a substantial body of persons* dan hanya merujuk kepada dirinya secara individu, oleh itu, syarat-syarat untuk penahanan tidak dipenuhi, menjadikan perintah tahanan tersebut menyalahi undang-undang. Bagi menyokong hujahan tersebut, pemohon bergantung kepada keputusan Mahkamah Persekutuan dalam kes *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 ('kes *Selva Vinayagam*'). Selanjutnya, pemohon berhujah bahawa apa-apa percubaan seterusnya untuk mengubah mana-mana perintah tahanan atau alasannya, tidak dibenarkan oleh undang-undang dan tidak dapat memperbaiki penyelewengan prosedur.

Diputuskan, mengenepikan perintah tahanan, mengeluarkan writ habeas corpus dan melepaskan pemohon dengan kadar segera:

(1) Mahkamah terikat dengan keputusan Mahkamah Persekutuan dalam kes *Selva Vinayagam*. Dalam kes semasa, pengataan fakta untuk perintah tahanan tersebut tidak menyatakan bahawa aktiviti yang telah dilakukan atau diancam oleh sebilangan besar orang adalah berkaitan atau melibatkan pengedaran dadah berbahaya. Tiada juga kenyataan bahawa pemohon adalah ahli kepada sebilangan besar orang. Berdasarkan pengataan fakta tersebut, mahkamah mendapati bahawa pemohon telah bertindak secara bersendirian dan bahawa tindakan membeli bekalan daripada 'pengedar dadah tempatan' tidak menyebabkan dia bertindak secara bersama atau bergaul atau berhubung dengan sebilangan besar orang (lihat perenggan 19, 24 & 26).

(2) Memandangkan terdapat peninggalan atau ketiadaan fakta bahawa aktiviti yang telah dilakukan atau sedang diancam oleh sebilangan besar orang adalah berkaitan dengan atau melibatkan pengedaran dadah berbahaya dan bahawa pemohon adalah ahli kepada sebilangan besar orang, ini menunjukkan bahawa fikiran Timbalan Menteri tidak

ditujukan ke atas persoalan penahanan pencegahan pemohon. Oleh itu, perintah tahanan tersebut adalah ultra vires (lihat perenggan 36).] A

Cases referred to

Kumareshan a/l Subramaniam v Dato' Chor Chee Heung & Anor [2003] 4 MLJ 384; [2003] 1 MLRH 607, HC (refd) B

Mohammad Zulkarnain bin Zamri Lwn Timbalan Dalam Negeri, Malaysia & lain- lain (Case No 05(HC)-105–06 of 2021(A)) (unreported), FC (refd)

Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 1 MLRA 83, FC (folld)

Thamilharasan a/l Narasimulu v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] MLJU 925, HC (refd) C

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), (2)(c), (3), 5(2), (4), 6(1), 9(2), 10(1) D

Federal Constitution arts 149, 151(1)

Hariharan Tara Singh (TS Hariharan & Partners) for the aplicant.

Anasuha Atiqah bt Mat Saidi (Federal Counsel, Attorney General's Chambers) for the respondents. E

Roz Mawar JC:

[1] The applicant filed this application for a writ of habeas corpus challenging the legality of detention order dated 24 June 2021 under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. The detention order was issued by the Deputy Minister of Home Affairs and the applicant was ordered to be detained at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor ('PPA') for the period of two years commencing from 24 June 2021. F G

[2] The basis of the challenge stems from the allegations of fact reasoning out the detention stating that:

(a) bahawa kamu didapati terlibat dengan aktiviti pengedaran dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine sejak pertengahan bulan Februari 2019 sehingga pertengahan bulan Mac 2021 secara tidak berterusan di bangsal belakang rumah No.22, Jalan Cenderamata, Kampung Kurnia, Johor Bahru, Johor; H

(b) bahawa kamu didapati menjual dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dalam bentuk peket (anggaran berat 6.25 gram) dengan harga RM300.00 sepeket, dalam bentuk peket (anggaran berat 12.5 gram) dengan harga RM600.00 sepeket, dalam bentuk peket (anggaran berat 25.0 gram) dengan harga RM1,200.00 sepeket, dalam bentuk peket (anggaran 50.0 gram) dengan harga RM2,000.00 sepeket, dalam bentuk peket (anggaran 250.0 gram) dengan I

harga RM9,000.00 sepeket dan dalam bentuk peket (anggaran berat 500.0 gram) dengan harga RM16,000.00 sepeket;

(c) bahawa kamu didapati membeli bekalan dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dalam bentuk paket (anggaran berat 100.0 gram) berharga RM3,500.00 sepeket, dalam bentuk paket (anggaran berat 1.0 kilogram) berharga RM30,000.00 sepeket dan dalam bentuk peket (anggaran berat 10.0 kilogram) berharga RM250,000.00 sepeket daripada pengedar dadah tempatan dan membuat pembungkusan semula ke dalam bentuk peket kecil bagi tujuan pengedaran.

[3] As the allegation of fact makes no reference to 'a substantial body of persons' and only refer to him alone, individually, the applicant contends that the requirement for detention had not been fulfilled, making the detention order unlawful, citing the Federal Court's decision in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 1 MLRA 83.

[4] It was also submitted for the applicant that any subsequent attempt to alter any detention order or reasons thereto, are not permitted by law and cannot make good the procedural irregularity. The case *Kumareshan a/l Subramaniam v Dato' Chor Chee Heung & Anor* [2003] 4 MLJ 384; [2003] 1 MLRH 607 was referred to.

[5] The learned federal counsel for the respondents, with valour acknowledged the ruling of the Federal Court in *Selva Vinayagam* in that the power under s 6(1) of the Act:

> may only be exercised if the following key ingredients are set out in the grounds of detention order and allegation of facts. One, *that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs*. Two, that *the detenu is a member of substantial body of persons.* Three, that the Minister is satisfied that it is *necessary in the interest of public order* that the detenu be subjected to preventive detention.

[6] Thus conceded that the allegation of fact in this case is similar to that of *Selva Vinayagam*'s but for the last at No (c) above that stated *membeli daripada pengedar dadah tempatan*.

[7] In her candor, the federal counsel submitted that the evolution of the element of 'substantial body of persons' at the Federal Court sees writs of habeas corpus granted on the ground that the allegation of fact do not state so, nor the statement of fact that the detinu is a member of a substantial body of persons. She submitted that the statement of *pengedar dadah tempatan* may be insufficient to establish the said element based on recent authorities though

unable to produce them. The approach the Federal Court take is to look at the role of the detenu.

[8] The respondent conceded to the facts in this case and leaves the matter to the grace of this honourable court.

THE SALIENT FACTS

[9] On 4 May 2021, the applicant was arrested under s 3(1) of the Act by Insp Wan Nur Munirah Wan Roslan with reasons to believe that there were grounds that the applicant was involved related crime justifying the holding of an inquiry against him. Insp Ahmad Hamidi is the investigating officer who was responsible in carrying out this investigation.

[10] On 12 May 2021, as further time was required for investigation, DSP Jody ak Nelson Wright reported the affairs of the arrest and status of the investigation to assistant commissioner of police Hasnan bin Hassin ('ACP Hasnan'). ACP Hasnan was the officer designated by the inspector general of police under s 3(2)(c) of the Act.

[11] On 17 May 2021, ACP Hasnan prepared the report of the affairs of arrest and detention of the applicant to theMinister of Home Affairs for the purposes of s 3(2)(c) of the Act.

[12] On 25 May 2021, inquiry officer Nor Jamilah Shuhadah bt Tohet had received the complete report from Insp Ahmad Hamid of his investigation pursuant to s 3(3) of the Act.

[13] On 17 June 2021, inquiry officer Nor Jamilah conducted an inquiry pursuant to s 5(2) of the Act to determine whether there are reasonable grounds for believing that the applicant has been or is associated with drugs trafficking activities.

[14] On 21 June 2021, inquiry officer Nor Jamilah submitted to the Deputy Minister of Home Affairs a written report pursuant to s 5(4) of the Act.

[15] On 24 June 2021 the Deputy Minister of Home Affairs, Dato' Sri Dr Hj Ismail bin Hj Mohamed Said had issued the detention order under s 6(1) of the Act. The allegations of fact are as per stated in para 2(a) to (c) above.

[16] On 26 June 2021, the applicant was sent to PPA. The applicant was given an opportunity to present his representations with regards to the detention order. The hearing of his representation was adjourned twice (28 July 2021 dan 4 August 2021).

[17] On 18 August 2021, the hearing finally proceeded before the advisory board. The applicant presented the same basis as is being argued here before this honourable court.

[18] On 27 August 2021, the advisory board submitted its recommendation to the Yang di-Pertuan Agong under s 10(1) of the Act.

THE LAW

[19] This honourable court's attention turns to the Federal Court's recent decision in *Selva Vinayagam*'s case, of which it is bound. The decision to grant the writ of habeas corpus was pursuant to an appeal on the grounds that the detention order, the allegations of fact and the Deputy Minister's affidavit revealed that the appellant had acted alone without any participation from any other person. There was no allegation that the appellant's activities were being conducted in association with 'a substantial body of persons'.

[20] In ruling that the three key ingredients must be fulfilled to exercise the power under s 6(1) of the Act, the Federal Court (from paras 21–30 of its decision) deliberated in depth on preventive detention law as the detenu is subjected to detention at the instance of the executive, without charge or trial. This is on the assumption that his release would not be in the best interest of society — specifically, that he would be likely to commit additional crimes if he was released — executive detention is designed to be employed in advance — as a preventive measure. Therefore, a detenu is detained not for what he has done, but for what he might do in the future if he remained at liberty.

[21] The Federal Court acknowledged that the liberty of the person is a fundamental right that cannot be overstated but appreciated that the guaranteed right to personal liberty is not freedom from executive detention … but to freedom from executive detention not authorised by law. It is the lack of legal authorisation which is the subject of prohibition. What is important is that the existence of such powers and its exercise must be clearly prescribed under the law.

[22] The Federal Court recognised that whilst art 149 of the Federal Constitution authorises the abridgement of fundamental rights, there are two built-in safeguards provided by art 151(1) at para 29 of its judgment:

> The first safeguard confers on the detenu the right: (a) to be informed of the

grounds for his detention and the allegations of fact, on which the detention order is based; and (b) to be given an opportunity of making representations against the detention order to an advisory board. The second safeguard relates to a detinu's rights against continued detention without an advisory board having considered his representations and made recommendations on them to the Yang di-Pertuan Agong.

[23] Therefore the allegations of facts are fundamental to ensure and illustrate that due process have been accorded to in protecting the detinu's rights. This is a safeguard feature so it is upon the allegations of facts that the applicant is informed the basis of his detention.

[24] In this case, the allegations of facts for the detention order *do not state* that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. There is also no statement that the applicant is a member of a substantial body of persons.

[25] In addressing that slight chance of connection to a substantial body of persons whereby the respondent referred to no (c) of the allegations of facts that stated the applicant was found to have bought his supplies from a *pengedar dadah tempatan*, this honourable court is reminded that the preventive detention order is only justified and lawful on the basis that the applicant had acted in concert or in association with a substantial body of persons. So, would such a statement mean in the affirmative?

[26] In answering this, this honourable court looked at all the allegations of fact (para 2(a) to (c) above) and find that the applicant was found to have acted alone, and that having bought the supplies from a *pengedar dadah tempatan* does not make him acting in concert or in association or relation with a substantial body of persons. There is no allegation that the applicant's activities were being carried out in association with or involved a substantial body of persons. So this honourable court does not find that the applicant here that his activities were being carried out in association with or involved a substantial body of persons.

[27] The recent case of *Thamilharasan a/l Narasimulu v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] MLJU 925 is also an application for a writ of habeas corpus to a detention order under s 6(1) of the Act. Similarly, there are three statements in the allegations of facts and at the third statement, *pengedar dadah tempatan* was mentioned. My learned brother K Muniandy JC (as he was then) found at para 14 of his judgment that:

The allegations against him has to be definite, specific and precise. It is attributed to him alone, solely and/or individually and he was not alleged to have concerted or

A associated himself with a substantial body of persons when committing the said acts of drugs trafficking. Although the allegations signify, he was preparing the drugs for distribution as it was repackaged into smaller packets, but the packets had remained so, since no buyers were named or identified in the allegations against him, whom have come forward to purchase them, if it is meant for sale or distribution B subsequently.

The detention order in that case was declared a nullity

C **[28]** This honourable court also considered the affidavit of the Deputy Minister of Home Affairs who had issued the detention order 'yang atasnya perintah itu diasaskan yang bersesuaian dengan keputusan dan kepuasan hati saya supaya pemohon ditahan mulai 24.06.2021'. The Deputy Minister affirmed, two months after the issuance of the detention order and the D allegations of facts, at para 8 of his affidavit that the facts stated in the allegations of facts to the detention order 'telah menunjukkan penglibatan pemohon dengan sekumpulan besar orang iaitu pengedar dadah tempatan bagi menjalankan aktiviti pengedaran dadah seperti yang diperuntukkan dalam Perkara 149 Perlembagaan Persekutuan dan Preamble Akta tersebut'.

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[29] However, nothing that was stated in the Deputy Minister's affidavit affirmed on 12 August 2021 is reflected in the allegations of facts dated 24 June 2021 (refer to para 2(a) to (c) above) and the detention order issued on the even date.

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[30] The Deputy Minister had averred in para 9 of his affidavit that he had instructed Aziz Abdul Nasir to prepare the detention order and the allegation of facts of which he 'telah meneliti dan menyemak dokumen-dokumen tersebut G dan saya telah berpuas hati bahawa ia menepati dengan keputusan, arahan, kepuasan hati dan kehendak saya agar pemohon ditahan selama dua tahun mulai 24.06.2021'. Thus the allegations of facts were properly reviewed by him before issuance which do not state any reference to a substantial body of persons or that the applicant is a member thereto.

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[31] On the other hand, further down the affidavit at para 13 it was affirmed that he had addressed his mind that because the applicant had bought the supplies from 'pengedar dadah tempatan' and had himself repackaged for sale as per the allegations of fact and the detention order, that proves 'penglibatan I pemohon dengan sekumpulan besar orang iaitu pengedar dadah tempatan dalam menjalankan aktiviti pengedaran dadah seperti yang diperuntukkan dalam Perkara 149 Perlembagaan Persekutuan dan Preamble Akta tersebut'. This honourable court cannot agree with this statement or accept it as it does not show so.

[32] It was also attested that 'peruntukan s 6(1) Akta tersebut tiada menyatakan tentang pemohon adalah ahli kumpulan. Saya juga ingin menegaskan bahawa keputusan dan kepuasan hati saya mengeluarkan perintah tahanan ke atas pemohon di bawah s 6(1) Akta tersebut tidak boleh dicabar berdasarkan peruntukan 11C(1) Akta tersebut melainkan di atas isu ketidakpatuhan prosedur sahaja'. To this, the decision in *Selva Viyanagam* (para 42 of its decision) takes precedence that the underlying purpose of the Act is self-evident in its long title and preamble — (a) the preventive detention of persons involved in illicit drug trafficking activities; and (b) to stop action which has been taken or is being threatened by a substantial body of persons which is prejudicial to public order.

[33] This honourable court also refers to the decision by Jeffrey Tan J (as he then was) in *Kumareshan a/l Subramaniam v Dato' Chor Chee Heung & Anor* [2003] 4 MLJ 384; [2003] 1 MLRH 607 where it was contended that the statement that the minister was satisfied that it was necessary to detain the applicant in the interest of public order should be stated in the detention order and not in a subsequent affidavit after the service of the order.

[34] It was held that 'an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his personal liberty. The failure to state in the detention order and the statement furnished under s 9(2) of the Act, that the minister was satisfied that it was necessary in the interest of public order that the applicant be detained, was a defect in substance and not form. The subsequent affidavit could not make good what was required to be done at the time of service of the order'.

[35] To conclude this matter, a final reference is made to the Federal Court's recent decision in October 2021 of *Mohammad Zulkarnain bin Zamri Lwn Timbalan Dalam Negeri, Malaysia & lain- lain* (Case No 05(HC)-105–06 of 2021(A)) (unreported) where it was affirmed that 'perintah tahanan hendaklah menyatakan bahawa orang tahanan telah terlibat dengan kegiatan sekumpulan oran (substantial body of persons)'.

[36] As there are omissions or absence of the fact that the activity which has been taken or is being threatened by a substantial body of persons relates to or involve the trafficking in dangerous drugs and that the applicant is a member of the substantial body of persons, this indicate that the mind of the Deputy Minister was really not applied to the question of preventive detention of the applicant. The dentention order is ultra vires and set aside. A writ of habeas corpus is hereby issued and the applicant is set at liberty forthwith.

Detention order set aside; writ of habeas corpus issued; applicant set at liberty forthwith.

Reported by Dzulqarnain Ab Fatar